No. 77-1466



# In the Supreme Court of the United States

OCTOBER TERM, 1977

---

FREDERICK N. BOSWELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

WADE H. MCCREE, JR.,
*Solicitor General,*

JOHN C. KEENEY,
*Acting Assistant Attorney General,*

SIDNEY GLAZER,
PATTY E. MERKAMP,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1977

---

No. 77-1466

FREDERICK N. BOSWELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 565 F. 2d 1338.

### JURISDICTION

The judgment of the court of appeals was entered on January 12, 1978, and a petition for rehearing with suggestion for rehearing *en banc* was denied on February 15, 1978. The petition for a writ of certiorari was filed on April 14, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the substitution of a federal magistrate for a district court judge during closing arguments to the jury violated petitioner's constitutional right to a trial by jury

and requires reversal of petitioner's conviction even though petitioner consented to the substitution and has made no showing of any prejudice resulting from it.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Mississippi, petitioner was convicted of conspiracy to commit mail and wire fraud (Count I), mail fraud (Count II), and fraud by wire (Count III), in violation of 18 U.S.C. 371, 1341, and 1343. He was sentenced to imprisonment for 18 months on Count I; on Counts II and III, his sentence was suspended and he was placed on probation for three years to begin after his release from confinement on Count I. As a special condition of his probation, petitioner was ordered to make restitution of the amounts he defrauded from the victims of his crimes. The court of appeals affirmed.[1]

1. The evidence at trial showed that petitioner and three others—doing business as Jackson Mortgage and Loan, Inc.—solicited investments in their mortgage company by offering promissory notes bearing a high interest rate.[2] They falsely represented to the investors

[1]The district court conditioned petitioner's probationary sentence on his repayment of the full amount others had invested in petitioner's fraudulent mortgage company scheme. The court of appeals reversed this part of petitioner's sentence, and remanded with instructions that petitioner not be required to pay more than the actual loss suffered by the investors (Pet. App. 1549-1550). This aspect of the decision below is not challenged in this petition (Pet. 7).

[2]Two of petitioner's co-defendants, Emmett Herndon and David Nichols, were also convicted on the mail fraud and conspiracy counts. Nichols was sentenced to five years in prison on Count I; on Count II, his sentence was suspended and he was placed on four years of probation to begin after his release from confinement on Count I. Herndon was sentenced to 18 months in prison on Count I; on Count II, his sentence was suspended and he was placed on three years of probation to begin after his release from confinement on Count I. Robert Doran was named in the indictment as an unindicted co-conspirator and testified as a government witness at trial (Pet. App. 1547).



that the money would be reinvested in mortgage loans on prime real estate, that the directors of Jackson Mortgage had more than 40 years of experience in the financing and development of real estate, and that Jackson Mortgage had certified public accountants in its employ. Contrary to these representations, however, the money received from the sale of the promissory notes was not invested in real estate but was diverted by petitioner and his co-defendants for their personal use (Pet. App. 1545-1547).

2. At the completion of the fifth day of trial, as closing arguments were ready to begin, the judge became ill and was unable to continue with the trial. At the suggestion of the trial court, and "[b]y stipulation of the parties and agreement of counsel," a federal magistrate replaced the judge during closing arguments (III Tr. 514-515). After the arguments were completed, the trial judge returned to the bench, delivered his charge to the jury, and received the verdict. Petitioner did not object either before, during, or immediately after closing argument to the temporary substitution of the magistrate for the judge (III Tr. 678).

In a motion for a new trial following conviction, however, petitioner raised the claim that the district court erred in allowing the magistrate to supervise the closing arguments. The district court denied the motion, and the court of appeals affirmed. The court of appeals held that the substitution of the magistrate was not in conformance with Rule 25(a) of the Federal Rules of Criminal Procedure because the magistrate was not a "judge

regularly sitting in or assigned to the court" and because the magistrate had not "familiarized himself with the record of the trial" as required by that Rule.[3] The court of appeals determined, however, that it was unnecessary to decide whether the violation of Rule 25 was also an invasion of petitioner's constitutional right to a trial by jury. Since petitioner had failed to show that he was in any way prejudiced by the substitution of the magistrate at the closing argument, the court held that the error claimed by petitioner was harmless beyond a reasonable doubt and affirmed the convictions (Pet. App. 1548).[4]

## ARGUMENT

1. Petitioner contends that the supervision of the closing argument by the magistrate violated his constitutional right to a trial by jury. In making this claim, petitioner does not argue that the Constitution requires in every case that a judge, rather than a magistrate, supervise the closing argument at criminal trials (Pet. 9).[5] Petitioner claims instead that the constitutional right to a jury trial is violated when any person authorized to preside at criminal trials has not familiarized himself with the record before assuming duties at the trial (Pet. 9-10).

---

[3]Rule 25(a) of the Federal Rules of Criminal Procedure provides:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

[4]The court of appeals did not decide whether petitioner made an express and intelligent waiver of his claimed constitutional right (Pet. App. 1548).

[5]Petitioner seems to concede that, in some circumstances, a magistrate may be constitutionally authorized to participate in criminal trials (Pet. 9).



Petitioner's claim is not substantial. In the first place, the Constitution does not require that "every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, * * * be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction." *Palmore* v. *United States*, 411 U.S. 389, 407. The Federal Magistrates Act, 28 U.S.C. 631 *et seq.*, reflects the absence of any constitutional impediment to the service of federal magistrates in criminal cases by permitting district courts to authorize magistrates to conduct pre-trial and post-trial criminal proceedings, 28 U.S.C. 636(b)(2),(3), and by authorizing magistrates to try federal misdemeanor offenses pursuant to 18 U.S.C. 3401, see 28 U.S.C. 636(a)(3).[6]

Moreover, there is no support in the cases on which petitioner relies for the proposition that the constitutional right to a jury trial requires that the judge or magistrate supervising the closing argument has "familiarized himself with the record of the prior trial proceedings" (Pet. 10). The requirement to which petitioner refers is established by Rule 25(a) of the Federal Rules of Criminal Procedure, see note 3, *supra*. There is no suggestion in the Notes of the Advisory Committee on Rules that this requirement is compelled by the constitutional right to a jury trial.[7] Furthermore, the requirement of Rule 25 applies, by its own terms, when the substitute judge is to assume

---

[6]Under 18 U.S.C. 3401(b), a misdemeanor defendant may elect to be tried before a district judge instead of the magistrate. Furthermore, since the magistrate sits without a jury under 18 U.S.C. 3401(a), the defendant must expressly waive his right to a jury trial. 18 U.S.C. 3401(b).

[7]The Notes state only that Rule 25 is derived from Rule 63 of the Federal Rules of Civil Procedure, 18 U.S.C. Appendix.

authority to try the case to its completion; the rule does not strictly apply to a case such as the present one where only the temporary and limited duty of supervising the closing argument is involved. See note 3, *supra*.

The case of *Capital Traction Co.* v . *Hof*, 174 U.S. 1—on which petitioner relies (Pet. 10)—is inapposite. That case states only that the Seventh Amendment right to a jury trial in civil cases includes the right to have the trial supervised by a judge empowered to instruct and advise the jury. See 174 U.S. at 13-14. As the court held in *Palmore* v. *United States*, *supra*, 411 U.S. at 407, there is no constitutional requirement that criminal trials be entirely conducted in all cases before Article III judges, and there is thus no constitutional obstacle to the limited participation of the federal magistrate in supervising the closing argument in this case.

Finally, even if petitioner possessed the constitutional right that he asserts here, petitioner freely chose not to delay the trial and agreed to proceed under the supervision of the magistrate. At the beginning of the closing argument, the magistrate recited the "stipulation of the parties and agreement of counsel" (III Tr. 514-515) to allow the magistrate to replace the judge during the arguments. Even under the standard of *Johnson* v. *Zerbst*, 304 U.S. 458, 464, this stipulation, entered with petitioner's participation and in his presence, constituted an intentional waiver of petitioner's known rights. More importantly, however, the decision to proceed under the magistrate's supervision was one of "the vast array of trial decisions, strategic and tactical," which counsel make, with the accused's participation, in criminal trials. See *Estelle* v. *Williams*, 425 U.S. 501, 512. Petitioner's failure to object to the substitution of the magistrate at the closing arguments is therefore alone sufficient to preclude him from raising the claim at this time. *Id.* at 512-513.



2. Even if it is assumed that the right petitioner asserts is of constitutional magnitude, and that he did not validly waive that right by stipulating to the substitution of the magistrate, the right to have the trial judge supervise the closing argument is not so fundamental to a fair trial that a violation of the right requires reversal of the conviction even though no prejudice has occurred. *Heflin* v. *United States*, 125 F. 2d 700 (C.A. 5) (judge absent during defense counsel's argument to the jury); see *United States* v. *Pfingst*, 477 F. 2d 177, 197 (C.A. 2), certiorari denied, 412 U.S. 941 (judge absent during jury deliberations); *Haith* v. *United States*, 342 F. 2d 158, 159 (C.A. 3) (judge absent during jury *voir dire*). The court of appeals correctly found in this case that the error alleged by petitioner was harmless beyond a reasonable doubt (Pet. App. 1548). Petitioner notes that defense counsel entered several objections to the manner in which the prosecutor reviewed the evidence on his closing argument (Pet. 5), but petitioner does not now claim that the government's closing argument was inaccurate, prejudicial or contained reversible error. In response to each objection, the magistrate ordered the prosecutor to confine his argument to the evidence presented or permitted defense counsel to correct the alleged misstatement (III Tr. 543, 638, 640, 656, 663-665, 669, 674-675). The magistrate informed the jury that they, and not the attorneys, were the ultimate factfinders (III Tr. 666). The trial judge emphasized this again during his instructions to the jury (Tr. III 678-680). Under these circumstances, as the court of appeals held, the magistrate's supervision, if error, was harmless beyond a reasonable doubt.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

JOHN C. KEENEY,
*Acting Assistant Attorney General.*

SIDNEY GLAZER,
PATTY E. MERKAMP,
*Attorneys.*

JUNE 1978.

DOJ-1978-06